UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GOOGLE DIGITAL ADVERTISING ANTITRUST LITIGATION	No. 21-MD-3010 (PKC)
This Response Relates To:	
THE STATE OF TEXAS, *et al.*, *Plaintiffs*, - against - GOOGLE LLC, *Defendants*.	No. 21-CV-6841 (PKC)

PRIVATE PLAINTIFFS' RESPONSE TO MOTION FOR LEAVE TO FILE THE UNREDACTED THIRD AMENDED COMPLAINT UNDER SEAL

The private plaintiffs identified below submit this response to the Plaintiff States' Motion for Leave To File the Unredacted Third Amended Complaint Under Seal (MDL ECF No. 174).[1] Pursuant to this Court's Individual Practices, we note that no conference is currently scheduled.

The States have proposed to redact paragraph 381 of the Third Amended Complaint relating to Google's "predictive modeling process." That redaction is unnecessary and inappropriate under *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006), for two reasons. *First*, unsealing this allegation will not harm Google's privacy interests because the allegation does not contain any non-public, technical details concerning Google's bidding

[1] "MDL ECF No." refers to the document numbers for documents filed in 21-md-3010.

programs. *Second*, the allegation describes one of Google's core anticompetitive behaviors and is thus important to the public's understanding of the States' complaint and should be afforded the highest presumption of public access.

1. The information in paragraph 381 does not reveal non-public details regarding a Google bidding algorithm. *See Lytle v. JPMorgan Chase*, 810 F. Supp. 2d 616, 626 (S.D.N.Y. 2011) (refusing to seal information that was "already in the public record"); *see also P&L Dev. LLC v. Bionpharma Inc.*, No. 1:17CV1154, 2019 WL 2079830, at *8 (M.D.N.C. May 10, 2019) ("already public" information is not appropriate to seal). Google previously represented to the Court that unsealing similar information in the States' Second Amended Complaint (MDL ECF No. 152) ("SAC") "would reveal non-public inputs into [a] particular bidding algorithm." Def.'s Mem. Supp. Mtn. To Seal at 7-8, MDL ECF No. 117. Dan Taylor, Google's Vice President of Global Ads, acknowledged that he lacked a "detailed understanding of the specific technical aspects described in [SAC ¶ 239]," yet he declared that unsealing "this type of information would severely and adversely impact Google's ability to compete in the market" and "competitors and potential business counterparties . . . could use this non-public and confidential information to replicate Google's proprietary features in their own products." Taylor Decl. ¶ 14, MDL ECF No. 119.

However, it is plain on its face that paragraph 381 reveals no proprietary features – or at least no new ones that are not already alleged in public complaints. *All* of the publisher-side complaints in this MDL have made analogous allegations. *See*, *e.g.*, SAC ¶ 142 ("Google strategically prevented publishers' users from being easily identified, with one critical caveat: Google enables itself to use that very same information for its *own* trade decisions.") (emphasis in original); Compl. ¶ 104, *Assoc. Newspapers Ltd. v. Google*, No. 1:21-cv-03446 (S.D.N.Y.

Apr. 20, 2021), ECF No. 1 ("Google prevents others from doing what it does itself: passing user IDs to its exchange and DSPs."); Am. Class Action Compl. ¶ 154, *In re Google Digit. Publisher Antitrust Litig.*, No. 1:21-cv-07034 (S.D.N.Y. Apr. 5, 2021), ECF No. 64 ("Google degraded the information available to others in the market, preserving complete information only for itself, by hashing user identifiers."); Compl. ¶ 83, *HD Media Co., LLC v. Google, LLC*, No. 1:21-cv-06796 (S.D.N.Y. Jan. 29, 2021), ECF No. 1 ("[B]uyers using Google's software . . . receive[d] extra information that allowed them to adjust their bidding strategy."). Similarly, the most recent advertiser class complaint in the Northern District of California litigation alleges that "Google's scrambling of IDs . . . has directly interfered with competition." First Am. Class Action Compl. ¶¶ 140-141, *In re Google Digit. Advert. Antitrust Litig.*, No. 1:21-cv-07001 (S.D.N.Y. Dec. 4, 2020), ECF No. 52.

Other already public allegations in the States' Second Amended Complaint reveal analogous details concerning Google bidding programs. SAC ¶ 149 ("Google's RPO program uses exclusive access to publishers' user IDs to dynamically adjust the price floors in Google's exchange" to a level based on "a buyer's predicted willingness to pay."); *see also id.* ¶¶ 148, 150, 154. Google did not protest that those allegations "would severely and adversely impact Google's ability to compete in the market." Taylor Decl. ¶ 14.

Outside of this litigation, Google acknowledges that it uses user information available to it to optimize its bidding. The ability to do so is part of Google's sales pitch to advertisers. *See, e.g.*, Google, *Display Smart Bidding Guide* 4, https://services.google.com/fh/files/misc/gda_smart_bidding_guide.pdf (last visited Nov. 16, 2021) (explaining that Google's bidding algorithm uses signals including "user characteristics" like "age and gender," "location," and "device" along with "user behavior" including "previous sites visited," "value of products

viewed," and "cross-device behavior and conversions"). Mr. Taylor's conclusory statement that "this type of information" is "non-public" is false. Taylor Decl. ¶ 14.[2]

Moreover, unsealing the information in paragraph 381 will not cause Google competitive harm. Since Google blocks rivals from using the very inputs the description of which Google seeks to seal, those rivals cannot "replicate Google's proprietary features in their own products." Taylor Decl. ¶ 14.

2. Google's using the information described in paragraph 381, while blocking rivals' use, is one of Google's primary anticompetitive behaviors. The alleged conduct both harms competition and shows that any assertion of privacy concerns is a pretext. The allegation is thus "useful to the public's understanding about . . . the strength of the state plaintiffs' claims" and should be "afforded the highest presumption of public access." Order at 8, MDL ECF No. 147 (citing *Bernstein v. Bernstein Litowitz Berger & Grossman LLP*, 814 F.3d 132, 142 (2d Cir. 2016)). There is no protectable secrecy interest in an illegal business method. *Cf. Lowell v. Lewis*, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (Justice Story: inventions that are "injurious to the well-being, good policy, or sound morals of society" are unpatentable).

The private plaintiffs below respectfully request that the Court order the unsealing of paragraph 381.

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[2] Google's conduct was also extensively described in last year's House Staff report. *See* Majority Staff of Subcomm. on Antitrust, Com. & Admin. Law of the H. Comm. On the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, at 210 (Google "combine[s] DoubleClick [ad server] data with personal information collected through other Google services"), 217 ("Google's agreements with device manufacturers . . . require that manufacturers configure a 'Client ID,' which is a unique alphanumeric code incorporated in the smartphone that enables Google to combine metrics tracked via the hardware with all the other data Google collects on users"), 217-18 ("Google can build sophisticated user profiles reflecting a person's demographic, where they are, and where they go, as well as which apps they use at what time and for how long. These intimate user profiles, spanning billions of people, are a key source of Google's advantage in its ad business.") (Oct. 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

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Respectfully submitted,

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[3] Pursuant to this Court's ECF Rule 8.5, counsel for plaintiffs Associated Newspapers Ltd. and Mail Media, Inc. represents that undersigned counsel for plaintiffs consent to the placement of their electronic signatures on this document.

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